**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **SHARON HYDE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **STEELE'S FOOD MART** | ) | |
| Respondent | ) | Docket No. 258,837 |
| | ) | |
| AND | ) | |
| | ) | |
| **SAFECO INSURANCE COMPANIES** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's Award dated December 7, 2001. The Board heard oral argument on August 21, 2002.

### APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Thiesing of Roeland Park, Kansas.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The Administrative Law Judge determined claimant suffered a 30 percent functional impairment but she had not met her burden of proof to establish either a work disability or that she was permanently and totally disabled.

Claimant requested review and argues that she is permanently and totally disabled or, in the alternative, she is entitled to a 77.5 percent work disability based upon a 100 percent wage loss and a 55 percent task loss. In addition, claimant argues the Administrative Law Judge erred in the average weekly wage determination.

Respondent argues the claimant has failed to meet her burden of proof that she is permanently and totally disabled and the Administrative Law Judge's decision should be affirmed on this issue. Respondent further argues claimant should be limited to her functional impairment because she did not make a good faith effort to obtain post-injury employment and her imputed wage exceeds 90 percent of her pre-injury wage. Lastly, respondent argues the claimant's functional impairment should be decreased to 24 percent.

The issues before the Board are:

1. What is the nature and extent of claimant's disability?

2. What is claimant's average weekly wage for calculation of her award?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties briefs and oral arguments, the Board finds the Administrative Law Judge's Award should be affirmed.

It was undisputed claimant suffered injury to her right shoulder and back when she slipped and fell on a wet floor she had recently mopped. Initially, claimant self-medicated with her husband's prescription medication but eventually claimant sought treatment and was advised by respondent's insurance carrier to see her own physician. Claimant's physician, Paul Sandu, M.D., referred her to Mohammed S. Shakil, M.D.

Claimant's treatment ultimately resulted in Dr. Shakil performing a partial acromionectomy, excision of the distal clavicle and rotator cuff repair of claimant's right shoulder on February 17, 1999. Thereafter, claimant was referred to Clio Robertson, M.D., and ultimately Dr. Robertson performed a diskectomy and arthrodesis at L2-3 on November 30, 1999.

Claimant has not been able to return to work since her surgeries. Claimant currently complains of pain in her lower back which goes into the left leg, right shoulder weakness and also pain from her back to her shoulder blade. Claimant uses a cane. Claimant applied for and is receiving Social Security disability benefits. Claimant is being treated for depression twice weekly and she testified her depression was due to the work-related injury and the pain.

Claimant was examined by Edward J. Prostic, M.D., on October 24, 2000, at the request of her attorney. Dr. Prostic placed the following restrictions on the claimant: (1) no lifting weights greater than 15 pounds occasionally or 5 pounds frequently; (2) no activities above shoulder level right-handed; (3) avoid repetitious pushing, pulling or reaching right-handed; (4) avoid repetitious bending or twisting at the waist; and, (5) avoid vibrating equipment or captive positioning. Dr. Prostic opined claimant is permanently and totally disabled from gainful employment because she is suffering from major depression. However, if the claimant recovered from her depression, Dr. Prostic opined the claimant would be employable.

Dr. Prostic rated the claimant's right upper extremity at the shoulder at 25 percent and claimant's lumbar spine at 20 percent to the body as a whole. These ratings combined for a 32 percent permanent partial functional impairment to the body as a whole based upon the AMA Guides, Fourth Edition.

Claimant was examined by William R. Gillock, M.D., on June 26, 2000, at the request of the respondent and its insurance carrier. Dr. Gillock placed the following restrictions on the claimant due to her back: (1) no lifting in excess of 20 pounds and on a repetitive basis; (2) no bending, repeated bending at the waist; and, (3) no work above the horizontal or away from her body with her right arm. Dr. Gillock opined the claimant is capable of working 40 hours per week.

Based upon the AMA Guides, Fourth Edition, Dr. Gillock opined the claimant had a 14 percent impairment to the right shoulder which converts to an 8 percent permanent partial impairment to the body as a whole. Dr. Gillock further opined claimant had a 22 percent permanent partial impairment to her lumbar spine but he attributed 5 percent to age-related degenerative changes to the lumbar spine. Accordingly, the doctor opined claimant's permanent partial impairment to her lumbar spine was 17 percent due to the work-related injury. Dr. Gillock noted the 8 percent and 17 percent would combine for 24 percent and that the 8 percent and 22 percent would combine for 28 percent.

The claimant was examined by Patrick L. Hughes, M.D., on June 25, 2001, at the request of respondent's attorney. Dr. Hughes, a board certified psychiatrist, testified that claimant had neither a psychiatric impairment nor disability attributable to the work-related accident. Dr. Hughes found it especially significant that claimant was unable to spontaneously relate any symptoms that would indicate she suffered from major depression. The doctor further noted claimant displayed an animated demeanor which was inconsistent with depression.

Initially, claimant argues that she is permanently and totally disabled. Claimant notes that Dr. Prostic opined she was permanently and totally disabled from substantial and gainful employment.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App.2d 110, 872 P.2d 299 (1993), held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

The claimant's permanent physical restrictions would not prevent her from seeking substantial gainful employment. Dr. Gillock testified claimant was capable of working a 40-hour work week. Dr. Prostic agreed that if claimant recovered from her depression, she would be employable. The vocational experts, Karen Terrill and Dick Santner, both testified claimant would be able to find full-time employment based upon her permanent physical restrictions. The Board concludes claimant's permanent physical restrictions do not prevent her from engaging in substantial gainful employment.

Because claimant's inability to engage in substantial gainful employment is caused by her psychological impediments rather than her physical impairments, the dispositive issue is whether claimant's psychological condition was caused by the work-related accident. As determined by the Administrative Law Judge, the qualified expert testimony of Dr. Hughes, in this instance, is more persuasive that claimant's perceived psychological condition was neither caused nor aggravated by her work-related physical injuries. Moreover, Dr. Hughes further testified that claimant does not suffer from depression and concluded it was evident that her self report of psychological distress was grossly exaggerated. The Board concludes claimant has not met her burden of proof to establish that she suffers from a psychological condition as a result of her work-related injury.

The claimant next argues that she is entitled to a work disability based upon a 100 percent wage loss and a 55 percent task loss.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be

> entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

Implicit in the Administrative Law Judge's Award was the finding that claimant did not make a good faith effort to obtain post-injury employment. The Board agrees. The claimant made no effort to seek post-injury employment. Moreover, the respondent arranged for two job interviews for claimant but she did not attend. It should be noted that although claimant maintained she was unable to drive the distance required to attend the interviews, there were no restrictions imposed that would prevent claimant from driving. Accordingly, the Board concludes claimant did not make a good faith effort to obtain post-injury employment.

Because of the finding claimant did not make a good faith effort to find post-injury employment, it is necessary to determine an appropriate post-injury wage based on all the evidence, including the expert testimony concerning the capacity to earn wages. Karen Terrill, claimant's vocational expert, testified claimant had the capacity to earn $6 an hour. Dick Santner, respondent's vocational expert, testified claimant had the capacity to earn from $5.15 to $7 an hour. Claimant was a part-time employee of the respondent with an average weekly wage of $137.12. Imputing the minimum wage to claimant results in an

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[1]Foulk v. Colonial Terrace, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2]Copeland v. Johnson Group, Inc., 24 Kan. App.2d 306, 944 P.2d 179 (1997).

[3]Id. at 320.

average weekly wage greater than 90 percent of her pre-injury wage. The claimant's disability is, for that reason, limited under K.S.A. 44-510e to her functional impairment.

The Administrative Law Judge averaged Dr. Prostic's 32 percent rating with Dr. Gillock's 28 percent and concluded claimant suffered a 30 percent permanent partial general body functional impairment. The Board agrees and adopts the Judge's finding. It should be noted that Dr. Gillock subtracted 5 percent from his 22 percent rating to the back because he concluded that percentage was due to age-related degenerative findings. post-injury However, claimant testified her back was asymptomatic until her work-related injury. It is axiomatic that aggravation of a preexisting condition constitutes a work-related accident. Because an asymptomatic preexisting condition became symptomatic, it was appropriate for the Judge to include the 5 percent in Dr. Gillock's percentage of functional impairment.

Lastly, claimant argues because there was confusion in the exhibits introduced regarding her average weekly wage, the best evidence was her testimony that she earned $5.50 an hour and worked 30 hours a week.

It is undisputed claimant was employed as a part-time employee and her average weekly wage should be computed as provided in K.S.A. 44-511(b)(4)(A).

At the deposition of John R. Phillips, the meat market manager and claimant's supervisor, several exhibits were offered which purported to show the number of hours claimant worked each bi-weekly pay period. There were discrepancies noted regarding the total hours worked for the same bi-weekly time period on the different exhibits. However, it was consistently reported on all the exhibits that claimant's hourly wage was $5.15.

Norman Steele, the owner/bookkeeper at the time of claimant's injury, testified he prepared all the documents and that Exhibit 2, to Mr. Phillips' deposition accurately reflected the hours claimant worked.

Mr. Steele noted that he had started and not completed Exhibit 4. That Exhibit 3 was a response prepared to answer a request by an insurance adjustor. A comparison of Exhibits 1 and 2 indicates that the discrepancy between the two exhibits was caused by the failure to include one bi-weekly pay period on Exhibit 1. It further appears that on Exhibit 3, the document sent to the insurance adjustor, the hours for a bi-weekly time period after the date of accident was incorrectly transposed to the previous bi-weekly pay period. Examination of the documents reveals there were discrepancies but when the transposed number and the failure to include a bi-weekly pay period on one exhibit are corrected there would not be any discrepancy in the documents. In any event, Mr. Steele testified Exhibit 2 to Mr. Phillips' deposition was an accurate reflection of the hours claimant worked prior to her accident.

Accordingly, the Board adopts the calculation proposed by the respondent and adopted by the Administrative Law Judge that claimant had an average weekly wage of $137.12. (266.25 X $5.15 = $1,371.19 ÷ by 10 = $137.12)[4]

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 7, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of September 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Matthew J. Thiesing, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation

[4]K.S.A. 44-511(b)(5).